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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/691,581	10/24/2003	Erich P. Lerchenfeld	07738.0173-01000	6955

7590 07/31/2006

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EXAMINER	
PADEN, CAROLYN A	

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 07/31/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/691,581	LERCHENFELD ET AL.	
	Examiner	Art Unit	
	Carolyn A. Paden	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *29 June 2006*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-43* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-43* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date *6-29-06*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on June 29. 2006 has been entered.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-24 & 32-43 are rejected under 35 U.S.C. 103(a) as being unpatentable over Zawistoski (2002/0048606 or WO 00/45648).

Zawistoski discloses a method of preparing microparticles of phytosterols and phytostanols. It is very well known in the art that phytostanol is the hydrogenated version of a phytosterols. From the PG Pub at page 3, paragraph 0040, the particle size of the starting material is

described to preferably be at 100 microns. At page 2, paragraph 0017, the microparticles are described has having the particle size of the claims. At example 1, yoghurt is prepared with microparticulates of phytosterols and/or phytostanols by mixing phytosterols with milk powder and milk, allowing the milk mix to stand at room temperature and then homogenizing the combination in a microfluidizer. In this case milk is regarded to be an aqueous material. The pressure used in the microfluidizer is disclosed at page 2, paragraph 0025. The use of emulsifiers in the product is shown at page 3, paragraph 0039. The claims appear to differ from Zawistoski in the recitation of the particle size of the starting material. But liquid milk is typically refrigerated so the mixture would have been heated by the exposure to room temperature conditions but no unobvious or unexpected result is seen from the difference, particularly with the final particle size falls within the range of the claims. Although viscosity is not mentioned, this property is an inherent feature to the product produced by the process. No unobvious or unexpected result is seen from the suggestion of the product viscosity. No unobvious or unexpected result is seen from such a particle size distribution. One of ordinary skill in the art would expect that a ground particle would have a distribution in of particle sizes.

Applicant argues heating features that are not a part of the claims.

Claims 1-43 are rejected under 35 U.S.C. 103(a) as being unpatentable over Yoon (2002/0064548).

Yoon discloses dispersing plant sterol in and aqueous phase and then adding it to beverages, including juice. Sitostanol, the hydrogenated form of sitosterol, is a selected phytosterols at page 2, paragraph 25. At page 3, column 2, the process is described whereby plant sterol is mixed with an emulsifier and heated to 200C. Then the mixture is treated to high speed stirring and homogenization. The distribution of the particle sizes is shown on Table 4. The claims appear to differ from Yoon in the recitation of the particle size of the starting material. No unobvious or unexpected result is seen from the selection of a particular particle size in Yoon particularly when the plant sterol is basically melted during the process. Although viscosity is not mentioned, this property is an inherent feature to the product produced by the process. No unobvious or unexpected result is seen from the suggestion of the product viscosity. No unobvious or unexpected result is seen from such a particle size distribution. It is appreciated that citrus beverage is not mentioned but citrus or orange juices are the most popular juices consumed.

Applicants' arguments are related to examiners reliance on a reference that includes intermediate steps not mentioned by applicant. But the claims are open to the inclusion of an intermediate step. Mere argument that the applicants' invention is different from Yoon is not sufficient to overcome the rejection.

This is a continued examination of applicant's earlier Application No. 10/691,581. All claims are drawn to the same invention claimed in the earlier application and could have been finally rejected on the grounds and art of record in the next Office action if they had been entered in the earlier application. Accordingly, **THIS ACTION IS MADE FINAL** even though it is a first action in this case. See MPEP § 706.07(b). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the

mailing date of the advisory action. In no, however, event will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano, can be reached on (571) 272-1398 or by dialing 571-272-1700. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Carolyn Paden

CAROLYN PADEN 1761
PRIMARY EXAMINER 7-26-06